

USDA's Food Stamp Increase is Illegal

To: FGA Partners

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Date: August 26, 2021

Key Points

- The U.S. Department of Agriculture's (USDA) food stamp increase is illegal.
- USDA failed to provide notice of the proposed change, which abandoned a 45-year-old cost neutral policy, and gave the public no opportunity to comment on the change prior to its implementation, violating §553 of the Administrative Procedure Act (APA).
- USDA also did not adequately explain the rationale behind its decision to completely abandon the cost neutral policy, violating §706 of the APA.
- The food stamp increase may also violate federal law by exceeding the amount of funds that Congress has appropriated.

Background

The Supplemental Nutrition Assistance Program (SNAP), commonly referred to as food stamps, is a federal benefits program administered by state governments. At the direction of Congress, the benefit amount for each eligible household is "formulate[d]" by the Secretary of Agriculture, "[s]ubject to the availability of funds appropriated" by Congress.¹ In 2019, the federal government spent approximately \$60.4 billion on the food stamp program.² In 2020, the amount jumped to \$79.1 billion.³ If USDA's new plan is allowed to move forward, the estimated annual cost of the food stamp program will skyrocket to \$92 billion.⁴

The Secretary determines the amount of money food stamp recipients may receive by creating a "thrifty food plan," which constitutes the Secretary's calculations of "the diet required to feed a family of four persons consisting of a man and a woman twenty through fifty, a child six through eight, and a child nine through eleven years of age."⁵ The maximum value of an enrollees' "allotments," or benefits, are "equal to the cost ... of the thrifty food plan."⁶

Importantly, the Secretary's calculation of the thrifty food plan cannot exceed "the availability of funds appropriated" by Congress.⁷ In fact, federal law requires that, if necessary, USDA reduce food stamp allotments to ensure spending stays at or below congressional appropriations for each fiscal year.⁸

In 1962, USDA released its first thrifty food plan—the "Economy Food Plan."⁹ USDA updated that plan four times—in 1975, 1983, 1999, and 2006—and each change, "incorporated changes to dietary guidance and updated information on food composition, consumption patterns, and food prices."¹⁰ For the past 45 years, USDA has managed to make these updates to the thrifty food plan while following a policy of "cost neutrality," increasing the allotment amount to adjust for inflation while keeping its total value "equal to the real value of the thrifty food plan" from 1975.¹¹ USDA has followed the policy of cost neutrality for the past 45 years consistent with congressional intent and presumably to avoid setting allotments that exceed appropriations. The Biden administration has radically departed from this process, claiming new authority to abandon this decades-old policy from the Agricultural Improvement Act of 2018, better known as the 2018 Farm Bill.

In §4002 of the 2018 Farm Bill, Congress added language to the definition of "thrifty food plan," providing that, "[b]y 2022 and five-year intervals thereafter, the Secretary shall re-evaluate and publish the market baskets of the thrifty food plan based on current food prices, food composition data, consumption patterns, and dietary guidance."^{12 13} While this new language requires USDA to make more regular updates to the thrifty food plan, it does not override USDA's historic cost neutral policy, nor does it negate the requirement that USDA, like all federal agencies, follow the requirements set forth in the Administrative Procedure Act (APA) when engaging in rule making.¹⁴⁻¹⁵ It also does not remove USDA's statutory obligation to calculate allotments consistent with congressional appropriations and reduce allotments that exceed appropriations.¹⁶

Upon taking office, Biden issued an executive order asking USDA to "consider taking ... steps to provide nutrition assistance to working families," which included, "updat[ing] food assistance benefits to reflect the true cost of a basic healthy diet."¹⁷ As it issued the order, the Biden administration criticized the existing thrifty food plan as, "out of date with ... economic realities ... [and] the modern cost of a healthy basic diet."¹⁸

On August 16, 2021, USDA released a new thrifty food plan.¹⁹ Though this plan, like the others before it, was released as a guidance document without notice and comment, it was different from the previous updates in one very important way. It no longer followed a policy which it had followed for decades. USDA, explicitly recognizing this difference, heralded the new plan as a “significant first,” acknowledging that, “for the first time in more than 45 years,” it no longer followed the old cost neutral policy.²⁰ The Department falsely claimed that this significant change was required by the new language in the 2018 Farm Bill.²¹

The new plan increases the SNAP allotment by 21.03 percent, up to \$835.57 per month—for every eligible family, regardless of geographic location—far exceeding any adjustment for inflation.²² For individuals, the new plan increases benefits by 27 percent on an annual basis as compared to the previous year.²³ USDA calculates that its new plan will cost federal taxpayers more than \$92 billion in 2022, an increase of over \$19.73 billion from the previous year.²⁴

The new plan does not discuss whether this historic increase, the largest in the program’s existence, is consistent with congressional appropriations, and it does not assess the policy ramifications of abandoning the cost neutral approach. Nor does it adequately explain the rationale behind its decision to abandon a sensible and fiscally prudent policy that has been in place for 45 years. This new increase will take effect on October 1, 2021.²⁵

This sudden significant increase in food stamp benefits, which fails to adhere to the cost neutral policy, is clearly illegal.

USDA Violated §553 of the APA

Whenever an agency, including USDA, promulgates a legally binding rule pursuant to congressionally delegated authority, it must engage in the rulemaking process outlined in the APA.²⁶ Agencies are required to provide the public with adequate notice of a proposed rule followed by a meaningful opportunity to comment on the rule before it is finalized.²⁷ The notice and comment requirement of §553 will generally be met so long as the agency “affords interested parties a reasonable and meaningful opportunity to participate in the rulemaking process.”²⁸ Following the

notice and comment period, the agency must consider the rule in light of the comments it received and provide a “general statement” outlining a rational basis for the agency’s final decision.²⁹

Here, USDA made an enormous increase to welfare benefits, completely abandoning a 45-year-old policy to keep food stamp allotments cost neutral, without going through the required rulemaking process. The public was never provided with notice that USDA was considering such a large increase to food stamps, nor was the public given the opportunity to provide comments in support or opposition. Without adequate notice and a meaningful opportunity to provide comments for or against the change, the public was deprived of its legal right to participate in the rulemaking process. This is a violation of §553 of the APA.³⁰ The food stamp increase is illegal and must be withdrawn.

USDA violated §706 of the APA

By abandoning the cost neutral policy that even USDA itself admits it has followed for the past 45 years, the Biden administration has made a significant change in policy with almost no attempt to justify that change. This failure violates section §706 of the APA, which requires courts to invalidate and set aside an agency action if it is “arbitrary, [or] capricious.”³¹

Under established law, a court will invalidate an agency action if the agency making the change fails to “articulate a satisfactory explanation for [the] action including a ‘rational connection between the facts found and the choice made.’”³² The agency must provide an adequate justification for its decision that is “the product of reasoned decisionmaking [sic].”³³ An agency decision that is the product of “illogical” or inconsistent reasoning will fail the arbitrary and capricious test.³⁴

USDA admits that the three prior updates to the Thrifty Food Plan, which occurred in 1983, 1999, and 2006, “incorporated changes to dietary guidance and updated information on food composition, consumption patterns, and food prices, but they were also cost neutral.”³⁵ Yet USDA now falsely claims that completely abandoning the cost neutral policy is justified “in light of the 2018 Farm Bill mandating the consideration of current dietary guidance, consumption patterns, food composition data, and current food prices.”³⁶ This claim defies logic.



A close examination of the factors USDA considered during the past updates, while remaining cost neutral, and those USDA must consider now, in light of the 2018 Farm Bill's language, reveals that the factors are exactly the same. They have not changed. The only thing that changed is USDA's willingness to follow the cost neutral policy.

Contrary to USDA's false claims, the 2018 Farm Bill did not change what it must consider when updating the Thrifty Food Plan; rather, it was a mandate to simply update the plan (which it had not done since 2006) every five years beginning no later than 2022, while considering the same factors it always had. Nowhere in the statutory language of the 2018 Farm Bill is there a suggestion that the cost neutral policy must be abandoned. In fact, it is not even mentioned in the bill. Clearly, if Congress had intended for USDA to abandon a policy it had followed for the past 45 years it would have mentioned that in the language of the bill. Congress did not.

For the past 45 years, USDA has strictly followed the cost neutral policy regardless of which party's president was in power, and now, USDA under the Biden administration must maintain that common-sense policy or else provide a sufficient justification for this major policy change. Its brief claim that the complete abandonment of the policy it has followed for 45 years is required under the 2018 Farm Bill is not even remotely supported by the statutory language. The illogical and unreasoned nature of this justification is simply inadequate under the APA, making this agency action illegal.

USDA's failure to articulate a rational reason for the sudden sizeable increase in welfare and complete abandonment of the decades-old cost neutral policy means that the decision would surely fail the "arbitrary and capricious" standard that would be applied by a court should it be legally challenged.

USDA May Be in Violation of Federal Law for Exceeding Congressional Appropriations

In addition to the APA violations, USDA's food stamp increase may be illegal for another reason. Depending on the total amount of funds Congress decides to appropriate for the food stamp program in Fiscal Year (FY) 2022, USDA's new thrifty food plan could be in violation of federal law

which prohibits the Executive Branch from increasing food stamp benefits beyond the amount appropriated by Congress.

Under federal law, USDA's calculation of the amount of food stamp funds that may be provided may not exceed "the availability of funds appropriated" by Congress.³⁷ In fact, if USDA raises the dollar amount of food stamps to a level that exceeds what Congress has appropriated, the law requires that the amount be reduced.³⁸

The law states, "[i]n any fiscal year, the Secretary shall limit the value of those allotments issued to an amount not in excess of the appropriation for such fiscal year."³⁹ The law adds that, "if in any fiscal year the Secretary finds that the requirements of participating States will exceed the appropriation, the Secretary shall direct State agencies to reduce the value of such allotments to be issued to households certified as eligible to participate in the supplemental nutrition assistance program to the extent necessary to comply with the provisions of this subsection."⁴⁰

Here, USDA completely ignored congressional authority to appropriate funds, making what it describes as "a significant change" to the food stamp program with a complete disregard as to the cost.⁴¹ As USDA admits, "for the first time in more than 45 years, maintaining cost neutrality did not drive the process."⁴² As a result of this new, novel approach to determining the amount for food stamp benefits, the cost of the food stamp program will skyrocket in 2022 to over \$92 billion, an increase of more than \$19.73 billion from the previous year.⁴³ Should Congress decide to fund the program with an amount less than what is needed to cover this 27 percent increase from the previous year, this new USDA plan will be in violation of federal law.

State governments should bring legal action against USDA under the APA or other authority and demand that the courts stop this misuse of executive power.

¹ 7 U.S.C. §2013(a), <https://www.law.cornell.edu/uscode/text/7/2013>.

² "SNAP Data Tables," U.S. Department of Agriculture (Aug. 2021), <https://fns-prod.azureedge.net/sites/default/files/resource-files/SNAPsummary-8.pdf>.

³ *Id.*

⁴ "Estimated Increase in SNAP benefits – FY 2022," U.S. Department of Agriculture (Aug. 2021), https://www.fns.usda.gov/TFP/state_table.

⁵ 7 U.S.C. §2012(u), <https://www.law.cornell.edu/uscode/text/7/2012>.

⁶ 7 U.S.C. §2017(a), <https://www.law.cornell.edu/uscode/text/7/2017>.

⁷ 7 U.S.C. §2013(a), <https://www.law.cornell.edu/uscode/text/7/2013>.

⁸ 7 U.S.C. §2027(b), <https://www.law.cornell.edu/uscode/text/7/2027>.

⁹ "Thrifty Food Plan, 2021," U.S. Department of Agriculture (Aug. 2021), p.5, <https://fns-prod.azureedge.net/sites/default/files/resource-files/TFP2021.pdf>.

¹⁰ *Id.* at 5-6.

¹¹ *Id.* at 6.

¹² 7 U.S.C. §2012(u), <https://www.law.cornell.edu/uscode/text/7/2012>; 7 U.S.C. §2027(b), <https://www.law.cornell.edu/uscode/text/7/2027>.

¹³ PL 115-334, Agriculture Improvement Act of 2018 (as amended through PL 116-94), p. 142 <https://www.fns.usda.gov/aia-2018-amended-pl-116-94>.

¹⁴ See 5 U.S.C. §553, <https://www.law.cornell.edu/uscode/text/5/553>.

¹⁵ See 5 U.S.C. §706, <https://www.law.cornell.edu/uscode/text/5/706>.

¹⁶ See 7 U.S.C. 2013(a), <https://www.law.cornell.edu/uscode/text/7/2013>.

¹⁷ "Fact Sheet: President Biden's New Executive Actions Deliver Economic Relief for American Families and Businesses Amid the COVID-19 Crises," White House Briefing Room (Jan. 22, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/01/22/fact-sheet-president-bidens-new-executive-actions-deliver-economic-relief-for-american-families-and-businesses-amid-the-covid-19-crises/>.

¹⁸ *Id.*

¹⁹ "USDA Modernizes the Thrifty Food Plan, Updates SNAP Benefits," U.S. Department of Agriculture (Aug. 2021); <https://www.usda.gov/media/press-releases/2021/08/16/usda-modernizes-thrifty-food-plan-updates-snap-benefits>.

²⁰ "Thrifty Food Plan, 2021," U.S. Department of Agriculture (Aug. 2021), p.vii, <https://fns-prod.azureedge.net/sites/default/files/resource-files/TFP2021.pdf>.

²¹ *Id.* at 6.

²² *Id.* at vi.

²³ "Estimated Increase in SNAP benefits – FY 2022," U.S. Department of Agriculture (Aug. 2021), https://www.fns.usda.gov/TFP/state_table.

²⁴ *Id.*

²⁵ 7 U.S.C. §2012(u)(4), <https://www.law.cornell.edu/uscode/text/7/2012>.

²⁶ 5 U.S.C. §553, <https://www.law.cornell.edu/uscode/text/5/553>.

²⁷ *Id.* at §553(b)-(c).

²⁸ See, e.g., *Forester v. CPSC*, 559 F.2d 774, 787 (D.C. Cir. 1977).

²⁹ 5 U.S.C. §553(c), <https://www.law.cornell.edu/uscode/text/5/553>.

³⁰ *Id.*

³¹ 5 U.S.C. §706(2)(a), <https://www.law.cornell.edu/uscode/text/5/706>.

³² *Motor Vehicle Manufacturers Association v. State Farm Auto Mutual Insurance Co.*, 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962)).

³³ *Id.* at 52.

³⁴ *Am. Fed'n of Gov't Emps., Local 2924 v. Fed. Labor Relations Auth.*, 470 F.3d 375, 380 (D.C. Cir. 2006).

³⁵ "Thrifty Food Plan, 2021," U.S. Department of Agriculture (Aug. 2021), p.5-6, <https://fns-prod.azureedge.net/sites/default/files/resource-files/TFP2021.pdf>.

³⁶ *Id.* at 6.

³⁷ 7 U.S.C. §2013(a), <https://www.law.cornell.edu/uscode/text/7/2013>.

³⁸ 7 U.S.C. §2027(b), <https://www.law.cornell.edu/uscode/text/7/2027>.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ "Thrifty Food Plan, 2021," U.S. Department of Agriculture (Aug. 2021), p.vii, <https://fns-prod.azureedge.net/sites/default/files/resource-files/TFP2021.pdf>.

⁴² *Id.*

⁴³ "Estimated Increase in SNAP benefits – FY 2022," U.S. Department of Agriculture (Aug. 2021), https://www.fns.usda.gov/TFP/state_table.